Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1446

ROBERT W. BARNES,

Petitioner,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Robert W. Barnes, hereby petitions for a writ of certiorari to review the decision of the Supreme Court of the State of Kentucky, which affirmed a Kentucky lower court's refusal to allow Petitioner a jury determination of his employment status under the Federal Employers' Liability Act (FELA), contrary to the guidelines and standards set forth in decisions by this Court.

(a) OPINIONS BELOW

The opinion of the Supreme Court of Kentucky is not yet reported. It appears in full in the appendix hereto, Appendix A. (A-1). The opinion of the Court of Appeals of Kentucky and the order denying petition for rehearing in the Court of Appeals of Kentucky are not reported. They appear in full in the appendix hereto, Appendix B and C. (A-10, A-15). The order for summary judgment is unreported and appears in full in the appendix hereto, Appendix D. (A-16).

(b) JURISDICTION

(i) Original Judgment Sought to Be Reviewed.

The decision of the Supreme Court of Kentucky was filed on December 19, 1978. The mandate was issued on January 9, 1979, and appears as Appendix E hereto (A-18).

(ii) Statutory Provision Conferring Jurisdiction.

The statutory provision which invokes jurisdiction in this Court of the petition for writ of certiorari is 28 U.S.C. § 1257(3).

(iii) Cases Sustaining Jurisdiction.

Cases believed to sustain jurisdiction include: *Pelliccioni v. Schuyler Packing Co.*, 419 U.S. 1099 (1975); *Baker v. Texas & Pacific R. Co.*, 359 U.S. 227 (1959); *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500 (1957).

(c) QUESTIONS PRESENTED

(i) Did the Kentucky Courts fail to apply the correct legal standard, as enunciated by this Court, in concluding that petitioner was not entitled to a jury determination on the issue of his status as an employee of respondent.

(ii) Did the Kentucky Courts fail to apply the correct legal standard, as enunciated by this Court, in concluding that petitioner was not entitled to a jury determination on the issue of whether or not the contract between respondent and petitioner's immediate employer, the Holland Company, had the purpose or intent to enable respondent to exempt itself from liability under FELA.

(d) STATUTORY PROVISIONS INVOLVED

The Statutes involved are from the Federal Employers' Liability Act.

(i) 45 U.S.C. § 51 provides:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part

from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

(ii) 45 U.S.C. § 55 provides in pertinent part:

"Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from liability created by this act, shall to that extent be void . . . ."

(e) STATEMENT OF THE CASE

Petitioner commenced this action against respondent railroad in 1973 in Greenup Circuit Court, Kentucky, under the Federal Employers' Liability Act to recover for injuries sustained as a result of respondent's negligence (R. 2-5).[1]

By the terms of the contract, respondent leased to the Holland Company its railwelding plant, including all the land necessary to operate the railwelding plant, together with equipment[2], spare parts and appurtenances (R. 55).

[1]"R" refers to the record in the Supreme Court of Kentucky, which is the same record utilized in the Kentucky Court of Appeals and by the Greenup Circuit Court.

[2]The numerous equipment referred to in the contract is set forth in Appendix F (A-19).

Briefly, a railwelding plant is an operation whereby sections of rail are welded together until a continuous length of rail of approximately 1,300 feet is formed. The primary purpose of the railwelding operation is to facilitate the installation of the rail by respondent along its tracks. The contract between respondent and the Holland Company also had a provision that respondent would provide an inspector to be on the job site daily to check welds for alignment and to verify the quality of welds (R. 59).

Pre-trial discovery, together with affidavits presented at the time of respondent's motion for summary judgment, developed facts to show that respondent retained full control over the railwelding operation and exercised daily control over the details of the work. This control of the details of the work and of the Holland Company employees included the following respects (R. 532-37): (1) Classification of Rails—The rails to be used for welding were provided by respondent, consisting of both new and used rails. Respondent had the final authority to reject a rail before the rail went through the welding process. It also told Holland personnel what types and weights of rails to weld. (2) Quality of Weld—The respondent's inspector checks each weld and alignment to determine if it is satisfactory. (3) Loading—Securing—The respondent provides the railroad cars onto which the finished welded rails are loaded. Once the rails are loaded it also has the final authority with respect to the adequacy of the tie-down procedures utilized in securing the rails. (4) Other Details—The respondent's superintendent and inspectors have taken it upon themselves to instruct and tell Holland employees how to do the various jobs on the assembly line whenever they have seen things they did not approve of,

specifically where they thought jobs were being done improperly. For example, the respondent changed the method of Holland employees in doing the finishing grinding. The respondent's supervisory personnel also took Holland's crane operator crew from their normal assigned station and duties and directed them to go elsewhere to do other duties, such as unloading or stockpiling rails. In addition, the respondent's superintendent also directed the Holland utility man to perform tasks in and about the operation of the railweld plant (R. 533-536). At the time of the accident, respondent's inspector was offering suggestions to petitioner on how to cut the rail (T. 537).

Normally, in the operation of a welding plant, special rail cars with guides are used to support and align the length of rail while it is being welded. Sometime prior to the accident, respondent had substituted on the length of cars a flat car not equipped with the guides (R. 536). Accordingly, there were neither guides nor support for the length of rail as it passed over the flat car. Complaints were made several times to respondent about the use of the flat car, to no avail (R. 536). The Holland Company supervisor had no authority to remove the car, so it remained in use until petitioner's accident (R. 536).

On July 15, 1971, the rail bent outward laterally for approximately 60 feet from the flat car in a horseshoe shape. Petitioner was severely injured when he attempted to correct the problem. He initiated this action against respondent under the Federal Employers' Liability Act, alleging that he was an employee of respondent, that the Holland Company was an agent of respondent, and that his employment with the Holland Company was a subterfuge by respondent to avoid the provision of the FELA (R. 2-5).

Respondent moved the circuit court for summary judgment, arguing (1) that petitioner was not an employee of the railroad, and (2) that the contract between respondent and the Holland Company did not violate the FELA (R. 171-76; 349-50).

Petitioner argued that the determination of these issues were for the jury under appropriate instructions (R. 514-15). Accordingly, the federal questions sought to be reviewed were raised in the pleadings, were argued at the time of the hearing on the motion for summary judgment, and decided adversely to petitioner. Appendix G contains a portion of the transcript of the hearing (R. 514-15) (A-24).

(f) REASONS FOR GRANTING THE WRIT

1. The decision below encourages railroad companies to contract necessary work to other non-railroad companies to avoid the application of the Federal Employers' Liability Act, in contravention of the Federal Statute.

2. The decision below is clearly erroneous in that the court either did not follow or improperly followed the guidelines and mandates set forth by this Court in prior decisions—that factual disputes under the FELA are properly ones for determination by a jury.

These two areas are entertwined both factually and legally, and thus will be discussed together. The difficulty arises in the lower court ruling that as a matter of law, petitioner was not an employee of respondent within the meaning of the FELA. By the simple expediency of depriving petitioner of a jury determination on this crucial issue, the lower court has encouraged railroads to enter into contracts with other companies to perform the neces-

sary tasks of the railroad. Unfortunately, one not an employee of the railroad cannot challenge the validity of a contract (such as entered into between respondent and the Holland Company) as being violative of the FELA. In *Robinson v. Baltimore & Ohio R. Co.*, 237 U.S. 84 (1915), this Court held that the application of 45 U.S.C. § 55[3] depends upon the plaintiff's employment. This Court stated that the "liability created" by the act extends only to employees and not to others. Accordingly, the provision is not applicable if plaintiff is not an employee within the meaning of the FELA.

The determination of petitioner's status based upon the conflicting evidence was not an issue to be decided by the court. In *Baker v. Texas & Pacific R. Co.*, 359 U.S. 227 (1959), this precise issue was presented. In *Baker*, petitioner commenced an action against the respondent railroad for damages for the death of petitioner's decedent. The action was commenced under the FELA. The decedent had been hired as a workman by W. H. Nichols & Co., Inc., which was doing work for respondent railroad along their main line right of way, when he was struck and killed by a train. The work consisted of strengthening and stabilizing the roadbed. Petitioner claimed that the decedent was an "employee" of respondent within the meaning of the FELA. The trial court declined to submit the issue to the jury, holding as a matter of law that Baker was not entitled to the protection of the FELA. After petitioner exhausted her appellate remedy, this Court granted certiorari[4] to investigate whether such an issue is properly one for determination by the jury. The Court noted that

[3]See pp. 3, 4 where the language is set forth.
[4]358 U.S. 878 (1958)

the familiar general legal problem as to whose "employee" a worker is at a given time under the FELA is a matter of federal law. This Court, in reversing the lower court, held at 359 U.S. 228-29:

> "Although we find no decision of this Court that has discussed the matter, we think it perfectly plain that the question, like that of fault or of causation under the Act, contains factual elements such as to make it one for the jury under appropriate instructions as to the various relevant factors under law. See Restatement, Agency 2d, § 220, comment *c*; § 227, comment *a*. Only if reasonable men could not reach differing conclusions on the issue may the question be taken from the jury. See Chicago, R.I. & P.R. Co. v. Bond, 240 U.S. 449, 36 S.Ct. 403, 60 L.Ed. 735. Here the petitioners introduced evidence tending to prove that the grouting work was part of the maintenance task of the railroad, that the road furnished the material to be pumped into the roadbed, and that a supervisor, admittedly in the employ of the railroad, in the daily course of the work exercised directive control over the details of the job performed by the individual workmen, including the precise point where the mixture should be pumped, when they should move to the next point, and the consistency of the mixture. The railroad introduced evidence tending to controvert this and further evidence tending to show that an employment relationship did not exist between it and Baker at the time of the accident. An issue for determination by the jury was presented. 'The very essence of [the jury's] function is to select from among conflicting inferences and conclusions that which it considers most reasonable.'"

Likewise, in the instant case, the evidence would support conflicting inferences and conclusions—such conclusions to be drawn by the jury after a full hearing and after an opportunity to view the witnesses and their credibility. The lower court's denial of petitioner's right to a jury determination of his employment status does not bode well for petitioner's co-employees and the many other individuals in similar situations under employment with a company doing what is obviously railroad work. This issue is not related only to the petitioner—and the troublesome issue does not end with the lower court's treatment of petitioner.

A similar issue which arose under the FELA—should the issue of the railroad's *liability* be determined by a jury—was decided in *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500 (1957), In *Rogers*, petitioner was awarded damages by a jury in his action against the respondent railroad under the FELA. The Missouri Supreme Court reversed, holding that petitioner's evidence failed to support the jury's finding of respondent's liability. This Court granted certiorari[5] to consider the question whether the decision invaded the jury's function. In reversing, this Court held at 352 U.S. 504:

> "We may assume that the jury could properly have reached the [Missouri Supreme] Court's conclusion. But, as the probative facts also supported with reason the verdict favorable to the petitioner, the decision was exclusively for the jury to make."

This Court went on to comment in detail on the importance of a litigant's right to have factual questions concerning negligence determined by the jury, and the role of the United States Supreme Court when it appeared that these rights were being abrogated. This Court declared the policy to be as follows, 352 U.S. 509-10:

> "Cognizant of the duty to effectuate the intention of the Congress to secure the right to a jury determination, this Court is vigilant to exercise its power of review in any case where it appears that the litigants have been improperly deprived of that determination. Some say the Act has shortcomings and would prefer a workmen's compensation scheme. The fact that Congress has not seen fit to substitute that scheme cannot relieve this Court of its obligation to effectuate the present congressional intention by granting certiorari to correct instances of improper administration of the Act and to prevent its erosion by narrow and niggardly construction. . . .
>
> "The kind of misconception evidenced in the opinion below, which fails to take into account the special features of this statutory negligence action that make it significantly different from the ordinary common-law negligence action, has required this Court to review a number of cases. In a relatively large percentage of the cases reviewed, the Court has found that lower courts have not given proper scope to this integral part of the congressional scheme. We reach the same conclusion in this case. The decisions of this Court after the 1939 amendments teach that the Congress vested the power of decision in these actions exclusively in the jury in all but the infrequent cases where fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury. Special and important reasons for the grant of certiorari in these cases are certainly present when lower federal and state courts

[5] 350 U.S. 964 (1956).

persistently deprive litigants of their right to a jury determination." (Footnotes omitted).

Although the *Rogers* case dealt specifically with the issue of jury determination of negligence, the same rationale applies to the issue of employment status. *Baker v. Texas & Pacific R. Co.*, 359 U.S. 227 (1959); *Ward v. Atlantic Coast Line R. Co.*, 362 U.S. 396 (1960); *Kelley v. Southern Pacific Co.*, 419 U.S. 318 (1974). In *Ward*, this Court held that the issue of whether or not the petitioner was an "employee" of the railroad was one for determination by the jury on the basis of all the relevant factors.

In *Kelley v. Southern Pacific Co.*, 419 U.S. 318 (1974), the parties agreed to try the question of employment to the trial court rather than to a jury. After a six-day hearing, the trial court ruled in petitioner's favor. The Court of Appeals reversed, concluding that the district court had applied an erroneous standard of FELA liability. This Court granted certiorari.[6] After a thorough discussion of the facts, this Court agreed that the district court had applied an erroneous standard, and remanded the case to require the trier of fact to re-examine the record in light of the proper legal standard.

In short, the line of cases for the past twenty years have emphasized the importance of having factual conflicts resolved by the trier of fact, usually a jury. Petitioner in the instant case has been deprived of this right. As a result, petitioner and several individuals like him engage daily in the hazardous railroad work unprotected by the scope of the FELA. In *Shenker v. Baltimore & Ohio R. Co.*, 374 U.S. 1 (1963), this Court stated, at 374 U.S. 11:

[6]416 U.S. 935 (1974).

" '[I]t was the conception of this legislation [FELA] that the railroad was a unitary enterprise, its economic resources obligated to bear the burden of all injuries befalling those engaged in the enterprise arising out of the fault of any other member engaged in the common endeavor.' If recovery were denied in this case, the railroads, by the simple expedient of doing each other's work, could tie their employees up in legal technicalities over the proper railroad to sue for injuries and perhaps remove from coverage of the Act a significant area of railroad activity. . . ."

Similarly, the respondent's contract with the Holland Company, under the interpretation given this case by the Kentucky courts, removes from coverage of the Act a significant area of railroad activity—the activity of railwelding engaged in by the petitioner and his fellow employees. It was not the intent of Congress to allow a railroad to circumvent its responsibility under the Act by having the work done by others. The Kentucky courts were in error in refusing to allow petitioner's status, and the validity of the contract, to be determined by a jury of petitioner's peers.

(g) CONCLUSION

For the above stated reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Kentucky.

Respectfully submitted,

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APPENDIX A

RENDERED: December 19, 1978
SUPREME COURT OF KENTUCKY
No. 78-SC-80-DG

ROBERT W. BARNES,

Movant,

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, etc.,

Respondent.

ON REVIEW FROM COURT OF APPEALS

No. CA-75-12

(Greenup Circuit Court No. 6163)

OPINION OF THE COURT BY JUSTICE STERNBERG

AFFIRMING

The movant (Barnes) seeks to recover damages from the respondent (The Chesapeake & Ohio Railway Company (C&O)) for personal injuries received by him while employed by the Holland Company (Holland), allegedly the agent of C&O. The primary question is: By whom was Barnes employed at the time of his injuries?

Barnes charges that the C&O is using Holland as a subterfuge to avoid the Federal Employers' Liability Act

(FELA). He further states that in truth and in fact Holland is the agent of C&O and he, in turn, as an employee of Holland at the time of his injuries was actually an employee of C&O under the terms of FELA and entitled to its benefits. This is denied by C&O.

On October 16, 1970, the C&O entered into a "lease and agreement" with Holland whereby Holland would operate C&O's railwelding plant. By the terms of the "lease and agreement," Holland undertook the task of joining sections of rails to a designated length by the use of specialty-type welding equipment owned by Holland. On July 15, 1971, and again on April 2, 1973, Barnes was injured while assisting a fellow employee in doing the work they were employed by Holland to do.

On October 29, 1973, Barnes filed suit against the C&O in the Greenup Circuit Court seeking to recover damages in the sum of $300,000 for personal injuries. Depositions, interrogatories and their answers, and affidavits were filed in support of motions for summary judgment by both Barnes and C&O. In Kelley v. Southern Pacific Company, 419 U.S. 318, 95 S.Ct. 472, 42 L. Ed. 2d 498 (1974), the court said: "Under the FELA, a covered railroad is liable for negligently causing the injury or death of any person 'while he is employed' by the railroad. Although petitioner acknowledged that he was technically in the employ of a trucking company rather than the railroad, he contended that his work was sufficiently under the control of the railroad to bring him within the coverage of FELA." On August 9, 1974, after arguments of counsel, the trial judge announced from the bench that summary judgment should go for C&O, and its counsel was directed to prepare the

order. Thereafter, Barnes filed two motions, each requesting the trial court to reconsider the propriety of its action in granting summary judgment in favor of C&O. At that time he also sought to have the deposition of James E. Vaught taken August 1, 1974, and the affidavit of Albert Barnes dated August 25, 1974, filed and considered by the trial court in disposing of his motions for reconsideration. Over the objection of C&O, the trial court permitted the deposition and the affidavit to be filed, and it considered them in denying the motion to reconsider. On August 26, 1974, the trial court entered summary judgment dismissing Barnes' complaint and amended complaint.

The judgment of the trial court was affirmed on appeal. This court granted discretionary review on June 6. 1978.

Barnes charges that the trial court committed three reversible errors in arriving at its answer to the primary question.

First, Barnes argues that C&O had the right to and did control his work activities; thus he contends C&O is his employer and he is its employee and entitled to the benefits of FELA. Barnes states that the issue of control is one to be determined by a jury after a full, factual hearing. With this statement, we are in full accord. However, where there is no genuine issue of fact which would support a finding that at the time of the injuries Barnes was under the control of C&O, the issue becomes a question of law for the judge to decide. This he did—summary judgment in favor of C&O.

For 18 years Barnes worked for Holland in its railwelding operations. The whole railwelding operation is performed on what is classified as a line production meth-

od. The 1971 injury was caused by a rail having jammed while on the railwelding assembly line. Barnes, while assisting another employee of Holland's, in an effort to release the jammed rail used a welding torch to cut the rail, which broke and seriously injured him. At the time of the 1973 injury Barnes was assisting James Taulbee, another employee of Holland's, in loosening bars to separate rails. Taulbee fell against Barnes, knocking him to the floor of the car and injuring him. During these 18 years Barnes sustained other injuries, some minor and others not so minor, which are not herein complained of and which have not been the subject of litigation. Never has he on any such occasions prior to the subject litigation contended that he was an employee of any company other than Holland. As a result of the 1971 and 1973 injuries, Barnes received negligible workmen's compensation benefits through Holland.

In an effort to determine the question of control or the right to control, we need to consider the rights, obligations and responsibilities of the respective parties. As to Holland, they were:

1. It had the right to hire and fire and the right to negotiate with its employees through a labor union in the fixing of wages;

2. It owned and utilized specialty-type railwelding equipment;

3. Payment of wages was made with checks of Holland, with the usual and necessary withholding deductions;

4. By its lease and agreement, it contracted for the use of all of C&O's railwelding equipment and facilities, except the specialty equipment which it owned;

5. It trained its own personnel;

6. Its employees were members of the United Steel Workers of America;

7. It had the responsibility for the maintenance of all of the equipment;

8. It had other similar operations going on at other places in the United States and Canada;

9. It determined the means and methods for doing the work;

10. It controlled the amount of work;

11. It contributed one-half of the premiums for the employees' life insurance and medical coverage; and

12. It controlled what work was to be done and how to do it.

As to C&O, they were:

1. It delivered rails to Holland at Worthington, Ky.;

2. It advised Holland of the type of rails to be welded;

3. It furnished and designated trains onto which the welded rails were to be loaded; and

4. It had the right to inspect and reject any weld of inferior quality.

In the determination of the issue, we must decide whether Barnes was employed by the railroad company at the

time he was injured. The determination of this issue comes from a consideration of all of the circumstances of the case. The primary factor is whether the railroad company had the power to direct, control, or supervise Barnes in the performance of the work at the time of his injuries. Kelley v. Southern Pacific Company, supra; De Paola v. New York, New Haven & Hartford Railroad Company, 198 F. Supp. 12 (1961).

When we compare the relative positions of the parties, it is evident that the "lease and agreement" provided for a day-to-day work program for the peripheral benefit of the railroad. It was not such a work program that was compulsory for the operation of the railroad system.

In Kelley v. Southern Pacific Company, supra, the Supreme Court of the United States, in speaking of control, said:

> "Under common-law principles, there are basically three methods by which a plaintiff can establish his 'employment' with a rail carrier for FELA purposes even while he is nominally employed by another. First, the employee could be serving as the borrowed servant of the railroad at the time of his injury. * * * Second, he could be deemed to be acting for two masters simultaneously. * * * Finally, he could be a subservant of a company that was in turn a servant of the railroad. * * *.
>
> * * *

> * * * Because the evidence of control or right to control was in serious dispute, the Court held that the case must be permitted to go to the jury. As we have indicated, however, the District Court found no such day-to-day supervision that would support a finding that petitioner and his coworkers were, in effect, employees of the railroad."

The facts in the instant case make it apparent that Barnes was not the borrowed servant of C&O at the time of his injuries, was not acting for both C&O and Holland at the time of his injuries and, finally, for the reason that Holland was not a servant of C&O, was not a "subservant" of Holland. Consequently, Barnes was not under the control of C&O so as to qualify for relief under the terms of the FELA. On each of the said two occasions Barnes was an employee of Holland, not of C&O. His work benefited the C&O only insofar as his participation, together with other fellow employees of Holland, in the work program was beneficial to C&O. The responsibility for operating the production line effort from beginning to end (alpha to omega) was that of Holland and not of C&O. C&O's participation in all respects was minimal and gratuitous and not by reason of its responsibility to do so.

In the case at bar the trial court found as a matter of law that Holland was an independent contractor and that at the time of his injuries Barnes was an employee of Holland, not an employee of C&O, and was not entitled to the benefits of FELA. This finding was affirmed by the Court of Appeals.

We have reviewed the record with care, and find that the trial court did not err in granting summary judgment to C&O.

The movant next charges that the trial court erred in ruling that as a matter of law the contract between C&O and Holland did not violate the FELA. Section 5 of the FELA states:

> "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from liability created by this act, shall to that extent be void."

We note with particularity that this section applies to those contracts wherein a railroad seeks to exempt itself from liability created by the Act. It does not hold as a matter of law that every contract executed by a railroad is void if one of its net results would avoid liability under the FELA. There certainly is no policy to prevent a railroad or any other business organization from performing its functions through independent contractors rather than through servants of its own. We find nothing in the record to suggest a subterfuge between C&O and Holland, whereby the railroad purposefully attempted to avoid liability under the FELA by entering into the subject contract with Holland. We certainly will not read such a purpose into the contract where none is clearly presented. We are of the opinion that each case must stand or fall on the facts therein developed. Irrespective of the fact that the result of Barnes' work, together with the work of the other employees of Holland could be classified as beneficial in the proper operation of a railroad, there is not one shred of evidence that the "lease and agreement" between C&O and Holland was executed for the purpose of avoiding liability under the FELA.

The action of the trial court in permitting the deposition and the affidavit to be filed and its action in considering them in disposing of the motion for reconsideration is now under attack.

This court is of the opinion that even without the benefit of the deposition and the affidavit, there still was no genuine issue of material fact that at the time of Barnes' injuries he was engaged in work which properly was that of the railroad. Consequently, we do not reach this alleged error.

The decision of the Court of Appeals is affirmed.

All concur, except Reed, J., who concurs in result only.

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APPENDIX B

OPINION RENDERED: December 16, 1977
TO BE PUBLISHED
COURT OF APPEALS OF KENTUCKY
No. 75-12

ROBERT W. BARNES,

Plaintiff,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, A Corporation,

Appellee.

APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE OSCAR SAMMONS, JUDGE
CIVIL ACTION NO. 6163
AFFIRMING

BEFORE: HOGGE, PARK AND WINTERSHEIMER, Judges.

Hogge, Judge. This is an appeal from a summary judgment entered in favor of appellee, Chesapeake and Ohio Railway Company.

Appellant, Robert W. Barnes, was employed as a shift leader at a railwelding facility. The plant and most of its equipment were owned by C & O and leased to Holland Company, Inc. The output of this plant went to C & O exclusively. While engaged in this employment, appellant was injured. Appellant thereafter filed suit against C & O

under the Federal Employers' Liability Act. C & O countered, alleging that Barnes was not an employee of C & O under the provisions of F.E.L.A. Upon motion of the appellee, the trial court entered summary judgment in favor of C & O. In this appeal, reversal of that judgment is urged on the ground that it was error for the trial court to hold that there was no genuine issue of a material fact as to whether or not appellant was an employee of C & O.

The standard to be followed in such cases was set forth in *Baker v. Texas and Pacific Railroad Company*, 359 U.S. 227 (1959), wherein the Supreme Court stated at page 665:

> The Federal Employers' Liability Act does not use the terms 'employee' and 'employed' in any special sense . . . so that the familiar general legal problems as to whose 'employee' or 'servant' a worker is at a given time present themselves as matters of federal law under the Act . . .[o]nly if reasonable men could not reach differing conclusions on the issue may the question be taken from the jury.

Thus, the issue of the existence of an employer-employee relationship is to be determined from the facts and circumstances of each case.

The factors to be considered were set forth in *Ward v. Atlantic Coast Railroad Company*, 362 U.S. 396 (1960):

> One of the issues to be decided in this case is whether or not the plaintiff . . . was employed by the defendant railroad at the time he was injured. This issue must be determined from all the circumstances of the case. The primary factor to be considered is whether or not the railroad had the power to direct, control,

> and supervise the plaintiff in the performance of his work at the time he was injured. Other relevant factors to be considered are: who selected and engaged the plaintiff to perform the work; who furnished the tools with which the work was performed; who paid the plaintiff his wages for the performance of the work; the amount of scale of such wages; and who had the power to fire or dismiss the plaintiff from the work.

Therefore, the issue before the court is whether reasonable men, upon consideration of the evidence relating to the aforementioned factors, could disagree as to whether the appellant was an "employee" of the railroad.

The appellant urges that the evidence relating to the primary factor, that of supervision, was conflicting. The railroad had a superintendent and an assistant superintendent at the plant as well as inspectors. The railroad and Holland Company denied that these personnel had authority to supervise Holland employees. However, the affidavit of Albert Barnes was to the effect that the C & O superintendents took it upon themselves to tell Holland employees how to do their various jobs. This, appellant avers, was a conflict in evidentiary facts that created an issue of ultimate fact, thereby, precluding summary judgment.

The appellee argues that it was error for the trial court to consider the deposition of James E. Vaught and the affidavit of Albert Barnes, because they were filed by the appellant after the date of the hearing on the motion for summary judgment. After the trial court's decision was announced, but prior to the entry of the judgment, the appellant entered a motion to reconsider and filed these documents therewith. The court denied the motion for reconsideration but allowed the additional evidence to be filed in the record.

In the case of *Conley v. Hall,* Ky., 395 S.W.2d 575 (1965), the court held that the hearing date was not necessarily the final date for the submission of additional evidence. However, the opinion in *Conley, supra,* made it clear that, once the merits of the motion were ready for final submission, no additional evidence could be filed. This holding was consistent with *Mills v. Reserve Life Insurance Company,* Ky., 335 S.W.2d 955 (1960), wherein the court stated at page 959:

> CR 56.03 states, in part: "The motion (i.e., for summary judgment) shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits." Once the hearing was held, on May 2, 1958, appellant's opportunity to file affidavits had passed, as clearly stated by the wording of CR 56.03.

In this case, the trial court held a lengthy hearing on the motion for summary judgment. At the conclusion of the hearing, the judge stated that he was sustaining the appellee's motion for summary judgment. Clearly, the merits of the motion were ready for final submission at the conclusion of the hearing, and the judge indicated how he was going to rule on the motion. It was, therefore, error for the court to allow additional evidence to be filed in the record after the motion was ripe for judicial determination.

In the absence of the affidavit of Albert Barnes, there is no evidence in the record that would give rise to an issue of

material fact, namely whether the C & O supervisors exercised any control over the Holland employees in the performance of their work.

This court is of the opinion that the trial court was correct in granting the summary judgment in favor of the appellee based on the record at the time of the hearing. Any evidence tendered to the court after that date was not timely and will not be considered by this court.

Judgment affirmed.

ALL CONCUR.

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APPENDIX C

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

No. 75-12

ROBERT W. BARNES,

Appellant,

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, A Corporation,

Appellee.

APPEAL FROM THE GREENUP CIRCUIT COURT
HONORABLE OSCAR SAMMONS, JUDGE

CIVIL ACTION NO. 6163

ORDER DENYING PETITION FOR REHEARING

BEFORE: HOGGE, PARK, AND WINTERSHEIMER, JUDGES.

The court having considered the Petition for Rehearing and the decisions of this court in *Nelson v. Martin*, Ky. App., 552 S.W.2d 668 (1977), and *Skaggs v. Vaughn*, Ky. App., 550 S.W.2d 574 (1977), and the court noting that the affidavit of Albert Barnes was not tendered to the trial court until after its ruling granting the motion for summary judgment, and the record not revealing any good reason why said motion could not have been filed prior to the hearing on the motion for summary judgment, it is hereby ORDERED that the Petition for Rehearing is DENIED.

/s/ JAMES PARK, JR.
Judge, Court of Appeals

ENTERED: February 10, 1978.

APPENDIX D

GREENUP CIRCUIT COURT
CIVIL ACTION NO. 6163

ROBERT W. BARNES,

Plaintiff,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, A Corporation,

Defendant.

This cause came on to be heard on Motion by the defendant, The Chesapeake and Ohio Railway Company for Summary Judgment and Amended Motion for Summary Judgment and on Motion by the plaintiff for Partial Summary Judgment and the Court having considered the affidavits, depositions and pleadings filed therein and the Court having heard arguments of counsel and due deliberation having been had thereon and the Court being sufficiently advised, it is

ORDERED that there is no genuine issue as to any material fact herein;

ORDERED that the defendant is entitled to a Judgment as a matter of law;

ORDERED that the defendant's Motion and Amended Motion for Summary Judgment be and the same hereby is granted;

ORDERED that the plaintiff's Motion for Partial Summary Judgment be and the same hereby is denied, and it is further

ORDERED AND ADJUDGED that the plaintiff's Complaint and Amended Complaint be and they are hereby dismissed with court costs to be paid by the plaintiff.

This 26 day of August, 1974.

OSCAR SAMMONS,
JUDGE, GREENUP CIRCUIT COURT.

APPENDIX E

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY

ROBERT W. BARNES

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, A CORPORATION,

MANDATE

File No. 78-SC-80-DG

Opinion Rendered December 19, 1978
Appeal From Greenup
Circuit Court Action No. 6163

The Court being sufficiently advised, and this Court's opinion having been rendered December 19, 1978, it is therefore considered that the decision of the Court of Appeals is affirmed, which is certified to said court.

Issued January 9, 1979.

/s/ MARTHA LAYNE COLLINS
Clerk

A Copy—Attest:

APPENDIX F

"I. Equipment Owned by C & O Railroad Company, Leased and Maintained by Holland Company for the purpose of Operating Welding Plant in Accord with Contract.

A. *Cropping Line*

(1) Custom Fabricated 'Lead In' Link Belt Adjustable Rollers mounted on concrete foundation used to support rail being pulled from rail trains.

(2) Link Belt 25 Horse Power Rail Pusher-Puller mounted on concrete foundation with 15 HP Car Puller mounted on top; both used to propel rail from rail train to cropping saw. Rail Pusher is operated by Saw Operator.

(3) 72 feet of Link Belt Powered Roller Conveyor used to support and move rail from Feed Table No. 1 and Rail Pusher-Puller to cropping saw. Conveyor is operated by Saw Operator.

(4) One Link Belt Feed Table to cropping line inbound conveyor consisting of steel supported chain conveyor on concrete foundation, driven by a 10 HP Drive Motor and two 1 HP transfer motors, used to accumulate and store individual rails to be fed through the cropping line. Feed Table is operated by Saw Operator.

(5) 2 each 150 Horse Power Tipman Cropping Saws mounted on concrete foundation, and used to saw or crop the ends from jointed rail.

(6) 1 each Link Belt Scrap Conveyor driven by a 2 HP motor used to catch and convey cropped rail ends from the saw line to cars. Scrap conveyor is operated by Saw Operator.

(7) 1 each 10 HP Scrap Car Puller mounted on a concrete foundation, and used to position cars for scrap loading under the scrap conveyor.

(8) 108 feet of Link Belt Powered Roller Conveyor mounted on concrete foundation and used to support and move rail from the Cropping Saw to the Inspection Building. Conveyor is operated by Rail Inspector or Saw Operator.

(9) 4 each Link Belt Custom Built Steel Supported Chain Conveyor Collection Tables mounted on concrete foundation and driven by 5 HP motors. Collection Tables operated by Rail Inspector.

(10) 211 feet of Link Belt Powered Roller Conveyor mounted on concrete foundation and used to support and move rail from the Rail Inspection Building to the Respective Collector Table. Conveyor operated by Rail Inspector.

B. *Rail Stocking & Handling*

(1) One each Manning, Maxwell & Moore 120 foot span, double cantilever, rail mounted, 30 ton, gantry rail crane. Crane, Serial No. 54-31424, is operated from overhead cab position and is used by Contractor to move rail in accord with plant requirements.

C. *Welding Line*

(1) One each Link Belt Custom made Steel Supported Chain Conveyor Feed Table mounted on concrete foundations and used to store rail and feed onto the Rail Welding Line. Table is remotely operated by the Rail End Polisher.

(2) One each Custom Built Link Belt Rail Life and Turn Device used to turn rail 180° for proper matching. Lift & Turn Device is remotely operated by the Rail End Polisher.

(3) 220 feet of Powered Roller Conveyor used to support and move rail when the welded string is backed up or moved ahead.

(4) One each size 24 AAR Roto Cone Type D, dry dynamic dust collector mounted on concrete pad and ducted into two grinding cars and one welding car. Operation is self-sustained from off-on switch at Rail End Polishing Station.

(5) One each track mounted Matisa Rail Base Polishing Machine. Machine is used to Polish Rail Base for Welder electrode contact.

(6) One each Powered Circulated Water Cooling System for Contract A-I Welder Components. Unit is custom built and operation is self-sustained.

(7) One each Matisa Mobile Combined Press, Machine No. 455, with vertical and horizontal cylinder used for straightening rails in the weld area. Machine is track mounted and operated by The Holland Company Inspector. Mounted on Mobile Combined Press is one Soniflux magnetic particle inspection unit for inspecting welds for flaws.

(8) Three each Matisa Rail Pusher Units used to move the welded rail from the welding line onto the rail train. The pushers are remotely controlled by the welding machine operator. These three Pusher Units bear Matisa Machine numbers 3-7464, 3-7465 and 3-3126.

(9) Seven each Link Belt Horizontally and Vertically adjustable Lead Out rollers with steel supports anchored to concrete foundations. Rollers are positioned by Contractors forces and are used to properly align rail going into rail trains.

(10) One each Hydraulic Power Unit driven by a 20 HP Revland Electric Company Model

2545 motor driving a Webster 2092 Pump. Power unit is operated by Holland personnel and used to operate hydraulic lift rollers mounted in the end cars of rail trains used to elevate the end of a rail string to the proper height.

D. *Auxiliary Equipment Owned by C & O Railway Company but Maintained by Holland Company, and used in Operation of Welding Plant.*

(1) One each Linc Welder 225---used for maintenance work. Unit bears C & O number PW-87.

(2) One each Hy-pressure Jenny Steam Cleaner, Serial No. 42612 used for maintenance.

(3) Two each Gardner Denver Model ADL 1003 Air Compressors. Supply service for A-I Welder & Hand Grinders.

(4) One each Model DC 250 MK electric Lincwelder used for maintenance.

II. One each Model 15 Pettibone Multikrane, C & O #M.C.-19, maintained by C & O Personnel in Railroad Shops, but operated by Holland Personnel at Welding Plant to supplement Plant Operation."

APPENDIX G

* * *

I would like to call the Court's attention to the Baker case which sets out the legal precedent and the guidelines for what makes the Federal Employers' Liability Act applicable in this type of situation. And I suppose I can sit here and argue until 4:00 A.M. what my interpretation of that case is, and Mr. Hobbs can sit here and he can do the same thing for his case, but in the last analysis the Court is the one that has to determine whether or not our position and our precedent is sound.

I just call the Court's attention to one area of that case. The case of Ward vs: Atlantic Coast Line, a U. S. Supreme Court case, and the Supreme Court rules the court erred in giving the following instruction, "If you find that the railroad, through its foreman, had the power to direct and control and supervise the plaintiff in the performance of the work he was doing at the time he was injured, then you should find for the plaintiff and that he was employed by the defendant railway company." They don't have to be standing over and exercising control at the precise moment of an accident, but that they have substantial control; that they have authority to do so and could exercise it at will, and I think that in this case the evidence clearly shows that from both the deposition and the testimony by affidavit of Mr. Vaught. And not only do we say there is a jury issue, we say that by these admissions the Court is compelled to find that if these admissions are true that the Court must find as a matter of law that he was an employee of The C & O Railway Company, as a matter of law, on the basis of those admissions. And that the Federal Employers' Liability Act applies in determining the liability of this situation.

I think that is all the comment I will make. If the Court has any questions it would like answered, I would try to do that.

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